

Exhibit 47

United States of America ex rel. Ven-a-Care of the Florida Keys, Inc v. Abbott Laboratories, Inc.; Dey, Inc., et al.; Boehringer Ingelheim Corp., et al.;
Civil Action No. 01-12257-PBS

Exhibit to the September 22, 2009, Declaration of George B. Henderson, II
In Support of Plaintiff's Response to Defendants' Combined Local Rule 56.1
Statement of Additional Material Facts Pertinent to the United States' Motions
for Partial Summary Judgment Against Defendants

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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IN RE: PHARMACEUTICAL INDUSTRY)
AVERAGE WHOLESALE PRICE LITIGATION) MDL No. 1456
-----) Civil Action
THIS DOCUMENT RELATES TO:) No. 01-12257-PBS
United States of America, ex. rel.) Hon. Patti Saris
Ven-a-Care of the Florida Keys,)
Inc., v. Dey, Inc., et. al., Civil)
Action No. 05-11084-PBS; and United)
States of America, ex. rel.) December 3, 2008
Ven-a-Care of the Florida Keys,) 9:32 a.m.
Inc., v. Boehringer Ingleheim)
Corp. et. al., Civil Action)
No. 07-10248-PBS.) VOLUME II
-----X

Continued deposition of THE NEBRASKA DEPT. OF HEALTH AND
HUMAN SERVICES by GARY CHELOHA, taken by Defendants,
pursuant to Notice, held at the Cornhusker Hotel, Lincoln,
Nebraska, before Shana W. Spencer, a Certified Shorthand
Reporter and Notary Public of the State of Nebraska.

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(CONTINUED)

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1 Exhibit No. 4.

2 Q. (BY MR. MAO) Mr. Cheloha, I'd like to
3 turn your attention to the second page, the last
4 full paragraph.

5 A. I see that.

6 Q. Can you read that aloud, please?

7 A. We would like to clarify HFCA policy
8 that a dispensing fee determination must be
9 separate and distinct from the EAC determination
10 and unrelated to the cost of the drug products.
11 In every instance, regardless of the State
12 determination of individual prescription payment
13 limits, the State must have established the
14 reasonable dispensing fees which would be used to
15 determine whether the State is in compliance with
16 the upper limits as specified in current drug
17 regulations at 42 CFR 447.331.

18 Q. Thank you. Has Nebraska ever increased
19 its ingredient cost reimbursement to make up for
20 inadequate dispensing fees?

21 MS. LORENZO: Objection. Form.

22 MS. CITERA: Form.

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1 THE WITNESS: No, it has not.

2 Q. (BY MR. MAO) Has Nebraska ever
3 increased its dispensing fee in order to make up
4 for inadequate ingredient cost payments?

5 MS. LORENZO: Objection. Form.

6 MS. CITERA: Form.

7 THE WITNESS: No, it has not.

8 Q. (BY MR. MAO) Has Nebraska Medicaid
9 ever decreased its dispensing fee to adjust for
10 inflated ingredient cost reimbursements?

11 MS. LORENZO: Objection. Form.

12 THE WITNESS: No, it has not.

13 Q. (BY MR. MAO) Thank you. In your --
14 one more question. In your extensive time with
15 the Medicaid program in Nebraska, has it ever
16 been the policy of the Nebraska program to use
17 one component of the pharmacy cost reimbursement,
18 be it ingredient cost or dispensing fee, to make
19 up for potential inadequacies of the other
20 component?

21 MS. LORENZO: Objection. Form.

22 THE WITNESS: No, it has not.

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1 in the Nebraska Medicaid program. Do you
2 remember talking to her about that?

3 A. Yes.

4 Q. Okay. And I believe you testified that
5 one of the considerations in setting the pharmacy
6 cost reimbursement was to make sure that enough
7 pharmacies were adequately compensated for their
8 pharmacy costs such that they could continue
9 participating in the Medicaid program; is that
10 correct?

11 A. Yes, it is.

12 Q. Okay. We also talked about the 1986
13 Jacobs study, the survey that was done. And as a
14 result of that, is it correct that Nebraska
15 adopted an EAC calculation of AWP minus 8.71
16 percent?

17 A. Yes.

18 Q. And do you recall that the 8.71
19 discount was based on a 70th percentile of
20 certain discounts that were offered?

21 MS. LORENZO: Objection. Form.

22 THE WITNESS: Yes. I believe that's

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1 correct.

2 Q. (BY MR. MAO) And by choosing the 70th
3 percentile, does that -- strike that.

4 By choosing the 70th percentile as the
5 point of establishing the discounts off of AWP
6 for all drugs covered by Nebraska Medicaid, is it
7 necessarily the case that not every pharmacy will
8 be able to purchase every drug at AWP minus 8.71
9 percent?

10 MS. LORENZO: Objection. Form.

11 THE WITNESS: Yes. That would mean
12 that some could not purchase it at that price.

13 Q. (BY MR. MAO) And is it that,
14 notwithstanding the fact that it was one of
15 Nebraska Medicaid's responsibilities to ensure
16 access, that it was also one of its
17 responsibilities to be fiscally prudent as the
18 steward of the Medicaid funds?

19 MS. LORENZO: Objection. Form.

20 THE WITNESS: Yes, it is.

21 Q. (BY MR. MAO) And that, based upon the
22 Nebraska Medicaid program's best judgments, AWP

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1 minus 8.71 at the 70th percentile represented the
2 best balancing of those dual competing
3 objectives?

4 MS. LORENZO: Objection. Form.

5 THE WITNESS: Yes, it does.

6 Q. (BY MR. MAO) When Nebraska Medicaid
7 moved to AWP minus 10 as the calculation method
8 for EAC, was a survey done to determine what
9 percentile that represented in terms of discounts
10 to Nebraska pharmacies?

11 A. No. The survey was not done.

12 Q. Notwithstanding that a survey was not
13 done, do you believe that that discount
14 percentage would have resulted in certain
15 pharmacists not being able to purchase drugs at
16 that discount?

17 MS. LORENZO: Objection. Form.

18 Q. (BY MR. MAO) AWP minus 10 percent?

19 A. Yes. I do believe that's the case.

20 Q. And, again, the AWP minus 10 percent
21 was the State's best attempt at balancing its
22 objectives of reimbursing -- reimbursing

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1 pharmacists adequately for their costs and being
2 fiscally prudent with the Medicaid funds?

3 MS. LORENZO: Objection. Form.

4 THE WITNESS: Yes. That's correct.

5 Q. (BY MR. MAO) And the same question
6 with regard to when the State moved to AWP minus
7 11 percent. Do you assume -- was a survey done
8 to determine what percentile of discounts that
9 represented --

10 MS. LORENZO: Objection.

11 Q. (BY MR. MAO) -- for Nebraska
12 pharmacists?

13 MS. LORENZO: Objection. Form.

14 THE WITNESS: No. No survey was done.

15 Q. (BY MR. MAO) But do you assume that,
16 based upon that discount off the AWP, that
17 certain pharmacies in Nebraska might not be able
18 to purchase certain drugs at that discounted
19 rate?

20 MS. LORENZO: Objection. Form.

21 THE WITNESS: Yes. That's correct.

22 Certain ones would not be able to.

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1 Q. (BY MR. MAO) And that was the best
2 balancing of its interests by the Nebraska
3 Medicaid program?

4 MS. LORENZO: Objection. Form.

5 THE WITNESS: Yes. That's correct.

6 MR. MAO: I have no more further
7 questions. Thank you very much for your time,
8 Mr. Cheloha.

9 THE WITNESS: You're welcome, Mr. Mao.

10 MR. DUNNING: Now, you've --

11 MS. LORENZO: Right. I've got --

12 MR. DUNNING: -- provided us an
13 informal request to have some redirect questions?

14 MS. LORENZO: Right. Is that -- it
15 looks like we're on schedule. Would that be
16 correct?

17 MR. DUNNING: Yes. I think so. And,
18 Toni, will you have redirect questions, also?

19 MS. CITERA: I may have a couple.

20 MR. DUNNING: Okay. I think we're fine
21 on time.

22 MS. LORENZO: Could we just take, like,